

**To:** Sisk, Richard[Sisk.Richard@epa.gov]  
**Cc:** Bove, James[Bove.James@epa.gov]  
**From:** Stachowiak, Robert  
**Sent:** Tue 8/25/2015 6:51:50 PM  
**Subject:** FW: Multiple Reviews Of EPA Spill Might Spur Abandoned Mine Policy Overhaul

Richard –

# Attorney Client/Ex. 5

Thanks,

Rob S.

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U.S. Environmental Protection Agency  
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**From:** Stachowiak, Robert  
**Sent:** Tuesday, August 25, 2015 2:46 PM  
**To:** Lesser, Ben; Cybulski, Walter; DiForté, Nicoletta; Farber, Glenn; Grandinetti, Cami; Hanley, Jim; Hillenbrand, John; Kulpan, Bruce; Kyte, Larry; Prins, Christopher; Purcell, Mark; Tiago, Joseph; Lensink, Andy; Baptista, Chrisna; Foster, Barbara; Bishlawi, Randa; Kobelski, Bruce; Cogliano, Gerain; Tomten, Dave; Derkasch, Patricia; Salo, Earl; Suriano, Elaine; Fidis, Alexander; Geselbracht, Jeanne; Guignet, Dennis; Luzecky, Hollis; MacDonald, Jennifer; Marcy, Ken; Jenkins, Robin; Mahmud, Shahid; Steiner-Riley, Cara; Barr, Linda; Kline, Bill; McMinimy, Chris; Hodes, Colette; Brown, Ernie; Ames, Jeremy; Kelly, PatrickM; Greenberg, Marc; Burgess, Michele; Pease, Michael; Vyas, Peggy; Phan, Phuc; Horton, Rachel; Benware, Richard; Anderson, RobinM; Palmer, Scott; Smeraldi, Josh; Taylor, Timothy; Stewart, Tracey; Buzzell, Tricia  
**Subject:** RE: Multiple Reviews Of EPA Spill Might Spur Abandoned Mine Policy Overhaul

**Attorney-client communication**

**Attorney work product**

Hi everyone –

## Attorney Client/Ex. 5

Thanks,

Rob S.

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**From:** Lesser, Ben

**Sent:** Monday, August 24, 2015 10:08 AM

**To:** Cybulski, Walter; DiForte, Nicoletta; Farber, Glenn; Grandinetti, Cami; Hanley, Jim; Hillenbrand, John; Kulpan, Bruce; Kyte, Larry; Lesser, Ben; Prins, Christopher; Purcell, Mark; Stachowiak, Robert; Tiago, Joseph; Lensink, Andy; Baptista, Chrisna; Foster, Barbara; Bishlawi, Randa; Kobelski, Bruce; Cogliano, Gerain; Tomten, Dave; Derkasch, Patricia; Salo, Earl; Suriano, Elaine; Fidis, Alexander; Geselbracht, Jeanne; Guignet, Dennis; Luzecky, Hollis; MacDonald, Jennifer; Marcy, Ken; Jenkins, Robin; Mahmud, Shahid; Steiner-Riley, Cara; Barr, Linda; Lesser, Ben; Kline, Bill; McMinimy, Chris; Hodes, Colette; Brown, Ernie; Ames, Jeremy; Kelly, PatrickM; Greenberg, Marc; Burgess, Michele; Pease, Michael; Vyas, Peggy; Phan, Phuc; Horton, Rachel; Benware, Richard; Anderson, RobinM; Palmer, Scott; Smeraldi, Josh; Taylor, Timothy; Stewart, Tracey; Buzzell, Tricia

**Subject:** Multiple Reviews Of EPA Spill Might Spur Abandoned Mine Policy Overhaul

## **InsideEPA.com, Daily News**

### **Multiple Reviews Of EPA Spill Might Spur Abandoned Mine Policy Overhaul**

Posted: August 21, 2015

Three pending government reviews of EPA's accidental release of 3 million gallons of contaminated wastewater from a Colorado mine during a cleanup operation might spur calls to overhaul federal policies on abandoned mines to create a uniform approach in how EPA and other agencies identify and cleanup such mines, advocates say.

But at least one small-government group hopes the studies will help them make a case that liability for releases from mine cleanups under the Superfund law and the Clean Water Act (CWA) should be eased, including through changes to "Good Samaritan" cleanup law. While EPA has sought to promote "Good Samaritan" cleanups of mine sites through guidance aimed at reducing CWA liability for innocent groups that voluntarily clean up abandoned hardrock mines, some groups have advocated for additional liability protections under the law to prompt such cleanups.

An EPA spokeswoman told *Inside EPA* Aug. 20 that the agency is working on an "internal technical review" of the Aug. 5 spill from the Gold King Mine in Colorado, which released wastewater containing heavy metals into the nearby Animas River. The review will proceed in parallel with an [an independent assessment](#) led by the Department of Interior (DOI) and an investigation by EPA's Inspector General (IG) office at the request of lawmakers.

All three studies will examine the circumstances under which the EPA cleanup crew triggered the release, which has prompted significant scrutiny from Congress and regular updates from the agency on its response.

A source at the environmental group Earthworks says that while multiple executive branch studies of the same incident could produce redundant results, they could also present a more compelling case for reforms if their conclusions agree on a need to make policy changes to prevent a similar situation occurring in the future.

"What I would hope is that especially the IG report gets at the underlying causes as to why EPA was forced to intervene on an *ad hoc* basis" by doing the cleanup work at the mine, which was abandoned around 1923, the source says. "[T]hat's because there's no unified organization in how you look at abandoned mines."

Earthworks and other groups have long argued for financial assurance rules under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), known as the Superfund law, that would require hardrock mine owners to set aside fund to pay for cleanup, accidental releases and post-closure care.

Without such rules, the source says, EPA and state environment departments are forced to address problem sites as their own funding allows, and without an overarching regulatory strategy.

“There's a will, but there's not a way, because there is no money. There's no systematic way of inventorying the mines, prioritizing them for cleanup, and then cleaning them up,” the source says.

## **Mining Policy**

Groups seeking financial assurance rules have sued EPA to force a deadline for action, and a federal appellate court ruled in May that EPA should update and expedite its schedule for issuing the regulations. EPA in recent months has said it plans to issue a draft version of the hardrock mining rules next August.

While the studies get underway, advocates say they are hopeful that potential unified conclusions on the need for [abandoned mine policy reform](#) could get a boost.

It is unclear at this point how, or whether, the scope of the three government studies into the wastewater spill will differ, since all three are still in their early stages.

DOI is performing “an analysis of the incident that took place at Gold King Mine, including the contributing causes,” according to an Aug. 18 statement from EPA, with a report set for release by Oct. 17.

The EPA spokeswoman says the agency's internal review is being conducted “by a team of five Regional and Headquarters people, at the direction of” Assistant Administrator for Solid Waste and Emergency Response Mathy Stanislaus. The spokeswoman continues that that team is looking solely at the causes of the spill and not its environmental impacts, and plans to deliver a report to Stanislaus “shortly.”

The IG is still determining the scope of [its review](#), according to a spokesman for the office. The Aug. 17 memo announcing the investigation said it would target “the cause of, and the EPA’s response to,” the spill, in response to a congressional request.

Regardless of the scope of the IG study, the Earthworks source says, the fact that other offices beyond EPA headquarters are investigating the accident will likely boost confidence in their results.

“Especially the Inspector General study will, I expect, give the people downstream more confidence in the findings. While I think the need for it is unfortunate, it's appropriate,” the source says.

## **Easing Liability**

At least one group that advocates for small government is countering that the three studies could help to bolster calls for easing liability under both CERCLA and the CWA.

Lawrence University economics professor David Gerard said in [an Aug. 13 blog post](#) for the pro-small-government environmental think tank Property and Environment Research Center wrote, “I wonder what this will do to potential Good Samaritan policies more generally. That is, what if it had been a Good Samaritan operation rather than the EPA that was responsible here?” and questioned potential future policy changes that might now occur.

“There seems to be almost universal agreement that relaxing Clean Water Act liability is necessary to promote abandoned mine cleanups. The remediating party would obtain a permit (from either a state agency or the EPA) that would limit some liability for pre-existing conditions, provided that the provisions of the permit are met,” Gerard wrote.

“In principle, there is broad support for measures that would relax or eliminate liability to promote these voluntary Good Samaritan remediation efforts. In practice, however, there is no agreement on what this would look like, and consequently there has been no statutory or regulatory enabling of Good Samaritan efforts,” he wrote.

“Some of the sticking points have to do with who would issue the permits and whether they could be issued for sites on federal lands. But the larger disagreement concerns who can be a remediating party. It seems to me that environmental groups support a narrow definition that limits Good Samaritan status to government agencies. Other groups, including the mining industry, advocate a broader interpretation that is more accommodating toward private parties as Good Samaritans, including re-mining and redevelopment,” the blog post says.

Along with groups seeking to bolster their push for reforms of the mine cleanup regime, the studies are also likely to inform litigation over the spill. The Navajo Nation has already declared its intent to sue EPA for damages from the Gold King release, and the agency also faces possible legal action by downstream states.

Attorneys familiar with cleanup law say that EPA will likely be sued for both natural resource damages and response damages [under CERCLA](#), which would deal with both environmental harms from the spill and the cost of addressing drinking water contamination and other short-term issues respectively. -- *David LaRoss*  
([dlaross@iwpnews.com](mailto:dlaross@iwpnews.com))